

# ARKANSAS COURT OF APPEALS

DIVISION IV  
No. CACR 07-789

CHRISTOPHER L. BRANNING  
APPELLANT

V.

STATE OF ARKANSAS  
APPELLEE

**Opinion Delivered** October 22, 2008

APPEAL FROM THE BOONE  
COUNTY CIRCUIT COURT,  
[NO. CR2004-244-4]

HONORABLE GORDON WEBB,  
JUDGE

REVERSED AND DISMISSED

**SARAH J. HEFFLEY, Judge**

Appellant Christopher L. Branning was found guilty in a bench trial of criminal mischief in the first degree and was sentenced to one year of probation. For reversal, appellant argues that the evidence is not sufficient to support the finding of guilt and that he was denied the right to a speedy trial. We reverse and dismiss.

*Sufficiency of the Evidence*

On the morning of February 14, 2004, Boone County Sheriff, Danny Hickman, went outside his home to get the Sunday paper and found that all four tires on his police cruiser had been slashed. He also discovered that the rear tires on a pickup truck he owned had been slashed. Appellant was subsequently charged with criminal mischief in the first degree for allegedly slitting the sheriff's tires.

At the bench trial, Sheriff Hickman testified that appellant held animosity toward him and that appellant also lived on Baughman Cut-off about a half a mile away from the sheriff's

home. Ricky Mayhugh, a life-long felon, was in jail with appellant after the tire-slashing incident, and Mayhugh testified that appellant told him on a couple of occasions that he (appellant) had cut the sheriff's tires. Heather Branning, appellant's ex-wife who was married to appellant at the time of the incident, testified that appellant told her that he had slashed the sheriff's tires. Ms. Branning also testified that appellant was with her the whole night of February 14-15, 2004, and that she thought appellant was joking when he said that he had cut the tires. Appellant denied slitting the sheriff's tires and elicited testimony that a student was implicated as a suspect but that this lead had not been investigated by law enforcement.

A motion to dismiss, which is identical to a motion for a directed verdict in a jury trial, is a challenge to the sufficiency of the evidence. *Reed v. State*, 91 Ark. App. 267, 209 S.W.3d 449 (2005). In reviewing this issue, the evidence is viewed in the light most favorable to the appellee, and the conviction is affirmed if there is substantial evidence to support the verdict. *Id.* Substantial evidence is that which will with reasonable certainty compel a conclusion one way or the other without resorting to speculation or conjecture. *Id.*

Appellant argues that the evidence is not sufficient to establish that he was the perpetrator of the crime. He contends that Mr. Mayhugh was not a believable witness and that the State did not overcome the alibi testimony given by his wife. He further argues that the investigation was incomplete because the student identified as a possible suspect was not investigated. As appellant recognizes, the issue here is one of credibility. It is the province of the fact finder to determine the weight of the evidence and the credibility of the witnesses. *Id.* The trial court in this case found credible the testimony that appellant admitted slashing the sheriff's tires. We are thus not able to say that the trial court's finding of guilt is not

supported by substantial evidence.

### *Speedy Trial*

Appellant filed a motion to dismiss asserting that he had been denied the right to a speedy trial. The trial court denied the motion. Appellant contends on appeal that the trial court's decision was in error. We agree.

On June 25, 2004, appellant was charged with multiple offenses, including the charge of first-degree criminal mischief at issue in this appeal. On February 2, 2005, the trial court granted appellant's motion to sever the first-degree criminal mischief charge from the other offenses. The trial of the other charges took place on February 22, 2005.

Appellant filed his speedy-trial motion to dismiss the criminal mischief charge on January 27, 2006, prior to the trial scheduled on February 1, 2006.<sup>1</sup> At the hearing, the prosecutor conceded that appellant was arrested on June 9, 2004.<sup>2</sup> According to our rules of criminal procedure, the time for trial begins to run from the date the charge is filed; but, if prior to that time, the defendant has been continuously held in custody, the time begins from the date of the arrest. *Rhoden v. State*, 98 Ark. App. 425, 256 S.W.3d 506 (2007). Here, the speedy-trial period began to run on June 9, 2004, the date of appellant's arrest. Pursuant to Rule 28.1 of the Arkansas Rules of Criminal Procedure, a defendant must be brought to trial

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<sup>1</sup> Appellant's speedy-trial motion was directed toward his trial scheduled for February 1, 2006. Appellant's trial, however, did not occur until January 2, 2007. The record shows, and appellant does not dispute, that the period between February 1, 2006, and January 2, 2007, are excluded and chargeable to appellant based on four continuances he received during this eleven-month period. *See Gamble v. State*, 350 Ark. 168, 85 S.W.3d 520 (2002) (delays resulting from continuances requested by the defendant are excluded).

<sup>2</sup> The State in its brief asserts that appellant was arrested on June 25, 2004. We find nothing in the record that squarely contradicts the prosecution's concession that appellant was arrested on June 9. Therefore, we consider June 9 as the date of appellant's arrest.

within twelve months, unless there are periods of delay that are excluded under Ark. R. Crim. P. 28.3. *Branning v. State*, 371 Ark. 433, \_\_\_ S.W.3d \_\_\_ (2007).

Appellant and the prosecution agreed that 601 days had elapsed between appellant's arrest and the February 1, 2006, trial date. Appellant and the prosecution also agreed that 209 days were excluded from the speedy-trial computation, leaving a delay of 392 days. Appellant argued that he had been denied the right to a speedy trial because the trial was scheduled to be held twenty-seven days beyond the one-year deadline. The prosecutor responded that there was another excludable period when the trial court continued the case due to docket congestion.

The trial court took the matter under advisement and later issued a written order denying appellant's motion. This order contained detailed findings of fact, and the court determined that there were two additional, excludable periods besides the ones agreed upon by the parties. As to the first period, a trial date had been set for August 2, 2005. On that day, the trial court entered an order continuing the case until October 25, 2005. The stated reasons for the delay in the order were "docket congestion" and "the fact that the defendant would have to appear before the same jury panel as his earlier trial of the severed offenses in this case." In denying the speedy-trial motion, the trial court excluded the eighty-four days between August 2 and October 25. In regard to the second period, on October 28, 2005, the trial court entered an order continuing the case to February 1, 2006, because of "docket congestion." The trial court ruled that this period of ninety-eight days was also excluded. At issue in this case is whether the trial court erred in excluding these two periods, either one of which would bring the trial within the speedy-trial limitations period.

Appellant demonstrated a period of delay that exceeded the one-year deadline for a speedy trial. Once a defendant establishes a prima facie case of a speedy-trial violation, the State bears the burden of showing that the delay was the result of the defendant's conduct or was otherwise justified. *Yarbrough v. State*, 370 Ark. 31, 257 S.W.3d 50 (2007). Rule 28.3(b) permits an exclusion for docket congestion "if in a written order or docket entry at the time the continuance is granted: (1) the court explains with particularity the reasons the trial docket does not permit trial on the date originally scheduled; (2) the court determines that the delay will not prejudice the defendant; and (3) the court schedules the trial on the next available date permitted by the trial docket." Also, the rule permits the exclusion of delays resulting from "good cause." Ark. R. Crim. P. 28.3(h).

We first consider the period excluded by the trial court for the time between October 25, 2005, and February 1, 2006. The continuance order entered by the trial court states only that the trial was continued "due to docket congestion." Standing alone, this statement does not meet the requirements of Rule 28.3(b). See *Berry v. Henry*, 364 Ark. 26, 216 S.W.3d 93 (2005); *Moody v. Arkansas County Circuit Court, S. Dist.*, 350 Ark. 176, 85 S.W.3d 534 (2002); *Miller v. State*, 100 Ark. App. 391, \_\_\_ S.W.3d \_\_\_ (2007). The order contains no explanation with particularity as to why the trial docket did not permit the trial on the scheduled date; it made no determination of prejudice to the appellant; and the order does not explain why there was no available trial date in three months' time. The trial court clearly erred in excluding this period of delay.

The order continuing the case from August 2, 2005, to October 25, 2005, suffers the same deficiencies. It, too, rescheduled the trial for "docket congestion" without further

explanation. Consequently, this period cannot be excluded on the basis of docket congestion. This order, however, contains an additional reason for continuing the case, which was to prevent appellant from having to appear before the same jury panel that sat on his previous trial concerning the severed offenses. This justification might be considered “good cause” under Rule 28.3(h), but factually, this assertion is not borne out by the record.

In his speedy-trial motion to dismiss, appellant noted a previous continuance that was granted from February 2, 2005, to May 10, 2005, so that appellant would be able to have a different jury panel than the one he appeared before on the severed offenses. In his motion to dismiss, appellant agreed that this period was excluded from the speedy-trial computation. At the hearing on the motion to dismiss, the prosecutor discussed this previous continuance and conceded that the case was continued to May 10, 2005, so that appellant would have a different jury panel. The order memorializing this continuance, entered on February 2, 2005, confirms that a new jury panel would be in place by May 10, 2005. Because a new jury panel was in place by May 10, 2005, it cannot be said that a continuance was necessary on August 2, 2005, for a “new” jury panel that was not involved in the trial of the severed charges. We thus hold that this period of delay cannot be considered as good cause.

On a final note, we observe that the trial court explained the congestion of its docket in the order denying appellant’s motion to dismiss. We understand the heavy caseload that the trial court labors under, but Rule 28.3(b) expressly requires the court to make its findings regarding docket congestion “at the time the continuance is granted.” Therefore, the court’s explanations at a later date do not satisfy this requirement of the rule.

If a defendant is not brought to trial within the requisite time, Ark. R. Crim. P. 30.1

provides that the defendant will be discharged, and such discharge is an absolute bar to prosecution of the same offense or any other offense required to be joined with that offense. *Dodson v. State*, 358 Ark. 372, 191 S.W.3d 511 (2004). Accordingly, we reverse and dismiss because appellant's right to a speedy trial was violated.

Reversed and dismissed.

HART and GLADWIN, JJ., agree.